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In the Supreme Court
OF THE
United States

October Term, 1929.

No. #38

AXEL LANGNES, Owner of the Diesel Halibut Vessel, "ALOHA," Her Engines, etc.,

Petitioner.

vs.

WINFIELD A. GREEN, Claimant.

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

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SUBJECT INDEX

	Page
Certificate of Counsel	26
Decision of the District Court	8
Decision of the Circuit Court of Appeals	12
Final Decree of the District Court	11
Prayer	25
Proceedings before the State Court	6
Proceedings before the District Court	6
Proceedings before the Circuit Court of Appeals	11
Reasons relied upon for allowance of Writ of Certiorari	15
Statement of Matters Involved	2

TABLE OF CASES

	Page
Aloha, The (This case below—District Court)	10
Aloha, The (This case below—C. C. A.)	12
Alola, The	21
Annie Faxon, The	21
Appeal of Bouker Contracting Co.	18, 21
Atlantic Gulf & West Indies S. S. Lines, In re	23
Benefactor, The	17, 18
Benjamin Noble, The	18
Boston Marine Ins. Co. vs. Metropolitan Redwood Lbr. Co.	21
Butler vs. Boston & Savannah S. S. Co.	18
Butler vs. Hines	20
Capitol Transportation Co. vs. Cambria Steel Co.	18
City of Camden, The	18, 21
Clarence P. Howland, The	24
Commonwealth, The	21
Craig vs. Continental Ins. Co.	20

	Page
Danks vs. Gordan	24
East River Towing Co.	24
Edward, The	24
E. I. Du Pont de Nemours & Co., Petition of	18
Erie Lighter No. 108, The	21
Harry Hudson Smith, The	21
Hartford Accident & Indemnity Co. vs. Southern Pacific Co.	17, 22, 23
Highway Construction Co. vs. McClelland	24
Henrietta, The	20
Huasteca Petroleum Co. vs. Cia de Navegacao Lloyd Brasileiro	22
King Iron & Bridge Co. vs. Otoe County	23
La Bourgogne, The	18
Linseed King, The	22
Llewellyn J. Morse, The	18
McLaughlin vs. Western Union Telegraph Co.	24
Muriel, The	21
New England National Bank vs. Calhoun	24
New York Life Ins. Co. vs. Johnson	24
Perez vs. Canadian Land & Fur Co.	24
Pocomoke Guano Co. vs. Eastern Transportation Co.	18, 21
Providence & New York S. S. Co. vs. Hill Mfg. Co.	18
Princess Sophia, The	18, 21
Quinlan vs. Pew	18
Republic, The	18
Rosenberg vs. Shuler	24
Standard Wholesale Phosphate & Acid Works vs. Chesapeake Lighterage & Towing Co.	18
Suquamish, The	21
Titanic, The	22
Tommy, The	21
Union Sulphur Co., In re Petition of	24
Van Eyken vs. Erie R. R. Co.	21

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To the Honorable, the Supreme Court of the United States:

The petition of Axel Langnes, owner of the diesel halibut vessel "ALOHA," an American fishing vessel, for a writ of certiorari directed to the Honorable the United States Court of Appeals for the Ninth Judicial Circuit, in a cause therein pending, civil and maritime, upon a petition of said Axel Langnes, as owner of said vessel, for exemption from or limitation of liability under Revised Statutes of the United States, 4282, 4283, 4284, and 4285, and Statutes of the United States amendatory thereof and supplemental thereto, and Admiralty Rules 51, 52, 53, 54 and 55, respectfully shows to the court:

STATEMENT OF MATTERS INVOLVED

1. From the evidence it is disclosed that your petitioner, Axel Langnes, is the sole owner of the American diesel halibut vessel "ALOHA," a vessel 56 feet in length, built and used for the halibut fishery, (Apostles, page 49) that said vessel, having a capacity of 28 gross and 19 net tons, was licensed in the fishing trade under the laws of the United States. (Apostles, page 50.) That your petitioner, the owner of said vessel, and respondent, Winfield A. Green, and certain other fishermen entered into an oral agreement for a venture in halibut fishing out of the port of Seattle, Western District of Washington, Northern Division, prior to May 13, 1927, under the provisions of which agreement your petitioner, as the owner of said vessel, was to act as master and respondent, Green, was to act as engineer and fisherman, and other persons were to act as fishermen and in other capacities on board said vessel. (Apostles, page 51.) The fishing was done on the basis of "lays"—that is to say, the fishermen, including respondent, did not sign articles, but performed their services upon the contingency of receiving a share of the net earnings of the vessel upon the following basis: The proceeds of the venture were to be divided, first, one-fifth of the gross earnings to the vessel, second, after the deduction of all expenses, the balance of the proceeds to be divided equally between your petitioner, as the owner and master, and the other fishermen, including respondent Green. (Apostles, pages 52, 53.)

2. The vessel was built at Seattle, Washington, in the year 1924, and during the voyage in question was identically as built in construction, design and structural equipment. (Apostles, pages 56, 57.) At the time of commencing the voyage in question and at all times up to the time of the injury of the respondent, the vessel was in all respects seaworthy, efficiently manned, equipped, furnished and fitted with suitable machinery, tackle, apparel and appliances in the usual and customary manner for vessels of her type and trade. (Apostles, pages 57.)

3. The respondent, Winfield A. Green, had been engaged as a fisherman on vessels of the same type and construction and was experienced in the duties required of a fisherman, having followed that calling all his life. (Apostles, page 68.)

4. On May 8, 1927, the vessel sailed from Seattle for the halibut banks East of Cape St. James, Queen Charlotte Islands, in the Gulf of Alaska, where, on the 13th day of May, 1927, the respondent was injured by being struck and hooked through the eye with a new halibut hook on a new halibut line while tending the ground line, which was then being hauled aboard the vessel by means of a power capstan or gurdy. (Apostles, pages 70, 76, 77, 78.)

5. Fishing for halibut was done by means of a long ground line, about 1,800 feet in length, to which were at-

tached gangions or leaders 52 inches long and placed at intervals of 13 feet along the ground line; to the end of the gangions halibut hooks were attached and this line was lowered over the side and stretched along the bottom of the ocean. Subsequently, one end of the ground line was taken aboard the vessel, passed through or around the capstan or gurdy, and the ground line was hauled aboard the vessel over a roller placed on the ship's side by means of power applied to the capstan. (Apostles, pages 69-71.)

6. On May 13, 1927, while so taking in the ground line off Cape St. James, the respondent, Green, was situated in the waist at the rail adjacent to the roller for the purpose of tending the ground line, freeing the gangions if they became tangled or hooked and fouled upon any object and removing the fish which had been caught. The winch was controlled by levers, one of which was placed at the rail within reach of and for use and operation by the fishermen in respondent's position, so that the operation of the winch and the operation of the ground line could be stopped and started as occasion required. (Apostles, pages 70, 90, 91, 94, 95, 96.)

7. Previous to the date in question, the respondent and the other fishermen on the vessel had been instructed by the master, your petitioner, in the usual and customary manner of handling this ground line and in starting and stopping of the capstan, and your petitioner had instructed

that the usual and safe method of tending the ground line was by the use of both hands, and that if the hooks caught in the ground line or elsewhere and became entangled, to move the lever and stop the winch and gangions until the hook was disentangled. Nevertheless, in disregard of these instructions, the respondent used only one hand in tending the ground line and refrained from stopping the capstan when the hooks became caught or entangled, as they frequently and customarily did, and allowed the hooks to be pulled or torn loose by the power of the capstan. One of the hooks caught on some object on or about the vessel or ground line, the evidence failing to disclose where or upon what, and the gangion, drawn taut by the moving capstan, snapped in-board and struck the claimant in the eye, causing serious injury. When asked whether he could have moved the lever and stopped the winch, as instructed, the respondent testified that he thought he could, that the gangions would stretch quite a little and that he could have moved the lever if he had attempted to do so, but did not do so. (Apostles, pages 76-99.)

8. At the time of the accident the petitioner was on board, as owner and master, performing his duties in the pilot house, and, chancing to be looking out of a window, was an eye witness to the accident. (Apostles, page 63.)

9. The evidence discloses that it was a common, usual and unavoidable occurrence, with which respondent and

the other fishermen on the vessel were experienced, for hooks to become entangled and to catch on all parts of the vessel, rigging and equipment, including the decks and clothing of the fishermen, while tending the ground line. (Apostles, pages 76, 90, 91, 93, 95, 96, 97, 107, 113, 115, 116, 119, 120, 121, 124, 126, 127, 128, 129, 137.)

10. Following the accident, respondent instituted suit in the Superior Court of the State of Washington, seeking to recover $25,000.00 damages, and made application for a jury trial. Prior to the trial of said action, your petitioner filed a petition in the District Court of the United States for the Western District of Washington, Northern Division, seeking exemption from or limitation of liability; stipulation for value of the vessel and her pending earnings at the close of the voyage in the sum of $5,000.00 was filed and the further prosecution of respondent's suit in the State Court was enjoined. (Apostles, page 13.)

11. The respondent filed claim and answered in the limitation proceeding, contesting both petitioner's right to exemption and his right to limitation of liability, alleging that the vessel was unseaworthy as built, in that the metal chain plates at the vessel's side were not covered with sheet metal; that the roller was placed too close to the chain plates and that the vessel was unseaworthy in these respects. (Apostles, pages 15, 37.)

12. The respondent excepted to the petition, contending that the court was without jurisdiction to determine the cause upon the ground that but one claim was presented and that since the owner was on board as master he must have been privy to and had knowledge of any unseaworthiness which existed, and was, therefore, not entitled to maintain the proceeding.

13. The District Court overruled the exceptions and the cause proceeded to trial on the 22nd day of January, 1929, before Honorable Jeremiah Neterer, Judge.

14. The petitioner put in his opening evidence to establish the prima facie case, at the close thereof proctor for petitioner stating as follows:

> "MR. BRONSON: I think the petitioner will rest on the question of limitation at this time. I suppose it will be in order for us to proceed in the customary manner and rebut claimant's proof as to liability."

and this procedure was approved by the court. (Apostles, page 57.)

15. Thereupon respondent, Green, undertook to establish his claim, and, at the close of claimant's evidence, the following proceedings were had:

> "MR. BASSETT: (Prosecutor for Claimant), I think that is all. We rest at this time.
>
> THE COURT: Is there anything?
>
> MR. BRONSON: At this time, the petitioner challenges the sufficiency of the evidence of the claimant on the question of total exemption.

THE COURT: What have you to say about that?

MR. BASSETT: I have a motion to make on my own behalf.

THE COURT: Make your motion.

MR. BASSETT: At this time I renew the motion I made at the close of—at the beginning of the case, and at the close of Mr. Langnes' testimony on the question of the right to limit liability in this case.

THE COURT: What have you to say about Mr. Bronson's motion. If his motion is well taken, then your motion is superfluous.

(Argument of counsel.)

THE COURT: The first thing for the Court to determine is whether there is any liability; and if there is any liability, then may it be limited? That is the order in which the Supreme Court has very recently stated the case must be disposed of. Now, I will hear both of you gentlemen on the respective motions. I would rather hear from Mr. Bassett whether any negligence is shown upon the part of the owner.

(Argument of counsel, with citation of authority.)

THE COURT: * * * To consider this case in its broadest aspect, that, as between employer and employee, the primary relation carries with it certain obligations: That the employer must furnish the employee a reasonably safe place within which to work; while the employee assumes all of the hazards that are either known to him, or open and obvious, or suggestive of danger.

Now, in this case, we have the testimony of the claimant himself; in fact, there is not much dispute in the evidence here. * * *

Now, this ground-line had to be drawn into the boat, and the gangions had to be disentangled from the

ground-line; and that was the business of the men employed for that purpose. They were instructed by the owner how that should be done.

The claimant in this case has been a fisherman for many years, and he knew how those things were done, and what was required to be done, and, as he says himself, as this went along, he saw how these hooks were catching, and that sometimes they caught, or stopped by catching, and it was necessary to stop the winch; and when asked whether he could have moved the lever, he said he thought he could, because the gangions stretched quite a little and that he could have moved the lever if he thought it was necessary to do it. * * *

There is nothing here in the evidence at all that would indicate that Langnes was in any way negligent in the performance of any duties required to be done by him, or the omission to do anything that he should have been required to do. Why, if this case was tried in any court, I don't care where, either state or federal court, why, you would not—it never would get anywhere; and for this Court to hold that, why, it would be absolutely wrong, and in violation of every rule of negligence known to me; and I have tried a good many negligent cases.

So that the motion of the owner must be sustained. There is no negligence that has been established in this case upon the part of the owner; and no negligence having been established, why, of course, limitation is not necessary, because there is no liability; and that will be the ruling of the Court, that the motion will be granted and the claim dismissed." (Apostles, pages 138-142.)

"THE COURT: * * * I should probably state there is not anything shown in this case that there was anything about the boat that was in any way dangerous, or out of harmony with the usual construction and the

mere fact that the owner afterwards put on sheet iron on a part of it, that is no evidence of negligence, no matter what time this was performed."
(Apostles, page 143.)

16. Thereafter, on the 25th day of January, 1929, the Court entered a written memorandum decision, (Reported as the "ALOHA," 1929 A. M. C., 320, 32 Fed. (2nd) 284.) finding, among other things:

"The vessel was in all respects seaworthy, efficiently manned, equipped, furnished and fitted with suitable machinery, tackle, apparel, appliances, etc., in customary manner, suitable for the venture. The claimant had been engaged as a fisherman for many years; that all of the fishermen on the said vessel were instructed by the master, petitioner, the usual and customary manner of operation of the ground-line. * * * The fisherman was required to operate the winch and to disentangle the gangions from the ground-line, and if halibut were hooked to detach them and put them in the boat. Such was the duty of the claimant at the time of his injury, and he was instructed by the owner that the usual method of doing it was by the use of both hands, and if the hooks caught in the ground-line or elsewhere and became entangled, to move the lever and stop the winch until the gangion and the hook were disentangled. One of the hooks hooked on some object on or about the vessel or ground-line, and the gangion, drawn taut by the moving winch, snapped and struck claimant in the eye, causing serious injury. When asked whether he could have moved the lever and stopped the winch, the claimant said he thought he could, that the gangions would stretch quite a little and that he could have moved the lever if he had attempted to do so, but did not do so. All of the dangers were known to the claimant; they were open and obvious; they were the usual and ordinary hazards necessarily attendant upon the undertaking.

The vessel thus equipped had been engaged in fishing for some years, and its construction was in the usual, customary fashion."

(Apostles, pages 145, 156.)

17. Thereafter, on the 4th day of March, 1929, a final decree conforming to the court's decision was entered, among other things, the court decreeing:

(1) That the accident described in the libel and petition herein, and the loss, destruction, damage and injury arising therefrom, was not caused by the design or the neglect of the petitioner, Axel Langnes, and did not occur with the privity knowledge of said petitioner.

(2) That the said petitioner be, and he is hereby forever exempt and discharged from all loss, damage, destruction or injury arising from, or growing out of the said occurrence happening on board said vessel "Aloha," on or about the 13th day of May, 1928.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT ON APPEAL

18. Following the decree of the District Court, claimant, respondent Green, duly appealed from the above mentioned decree to the United States Circuit Court of Appeals, Ninth Circuit. The matter came on duly for argument before Honorable Frank S. Dietrich and Curtis D. Wilbur, Circuit Judges, and Harold Lauderback, District Judge, at

the September term, Seattle, on the 17th day of September, 1929.

On the 21st day of October, 1929, the Honorable Circuit Court of Appeals filed its decision herein. (Apostles, p. 174) and (Reported as the "ALOHA," 1929 A. M. C. 1642.) wherein it was held in part as follows:

> "The appellee alleges in his libel,
>
> "'that petitioner desires to claim the benefits of sections 4283, 4284 and 4285 of the Revised Statutes of the United States and the Acts amendatory thereof and supplemental thereto, and in this proceeding by reason of the facts and circumstances hereinbefore set forth, petitioner further desires to test its liability and the liability of said M. S. 'Aloha' to any extent whatever for any and all loss, destruction, damage and injury caused by and resulting from the occurrence aforesaid or other casualties of said voyage'."

"He also alleged that his vessel was seaworthy, that the injury to the appellant was entirely due to his own negligence in handling the fish-lines, and that the appellant knew of the danger involved in reeling in the ground-line with fish-hooks attached, and assumed the risk of the operation in which he was engaged, and that the expedition was a joint venture. (Apostles, p. 175.)

* * * * * Appellant (respondent Green) claims that inasmuch as the owner of the vessel was in actual charge thereof at the time of the accident, had furnished the vessel for the expedition and was responsible for her seaworthiness, there was no basis for limiting the liability of the owner of the vessel because the owner was not 'without knowledge or privity' of the conditions responsible for the accident. (Apostles, p. 177.) * * * * *

The appellant having elected to pursue his common-law remedy in the state court, the jurisdiction of the admiralty court depended upon the right of the owner to limit his liability to the value of the ship and cargo. (Section 4283 Rev. Stat.; Comp. Stat. 8021; 46 U. S. C. A., Section 183.) That right in the case at bar was dependent upon the question as to whether or not the negligence upon which the appellant's claim is predicated was without the knowledge or privity of the owner of the vessel. This question is in a measure independent of the question of whether or not there was negligence and of the affirmative defenses thereto, and must therefore depend on the nature of the negligence alleged by the injured party as a basis for his recovery and on the relation of the owner thereto. That question we will now consider. (Apostles, p. 179.) In the case at bar the claim of the appellant is based upon the fact that the metal chain plates of the 'Aloha' to which the backstays were attached extending from the rail downward for about two feet, were not flush with the side of the vessel, and were not covered by a metal plate, and that therefore the hooks were liable to momentarily catch in the side of the metal chain plates and be snapped loose by the pull of the winch. The defect, if it was a defect, was perfectly obvious to the owner and to the crew. Its proximity to the roller on the rail of the shop over which the ground-line was being drawn to the winch was obvious. It appears from the evidence not only that the owner of the vessel was on duty in the pilot-house but also that he had directed the appellant to tend the ground-line as it came over the side of the vessel and had observed him in that work. Whether the hook which injured the appellant's eye actually caught on the chain plate, or whether it caught in the soft wood of the ship's side is a matter of inference to be drawn from the evidence. The appellee contended, and the Court found, that the risks, such as they were, were obvious and were assumed by the appellant. They were, of course, as obvious to the owner as to the

appellant. If, as a matter of fact, the vessel was unseaworthy for the purpose for which it was being used by reason of the failure to cover the chain plates with sheet metal so as to diminish the chance that the hooks would catch while coming aboard, the owner of the vessel who had prepared it for the service and who was fully advised, by reason of his long experience, as to the character of the operations to be performed and as to the dangers thereof, was necessarily in privity with and had knowledge of the conditions. The only persons involved in the accident to the appellant were the owner and master of the vessel who furnished the appliances and who controlled the vessel at the time of the accident, and the appellant himself who was operating the instrumentalities by which he was injured. Under these conditions, if the owner was liable to the extent of the value of the vessel, he was also liable for the entire damage suffered by the appellant. * * * * * There is, therefore, no basis for the limitation of the liability of the owner upon a claim of negligence based upon the failure to cover the chain plates with sheet metal because of his ignorance, for he had full knowledge thereof. That being true the Court had no jurisdiction to proceed and pass upon the merits of the case or to determine whether or not such failure was negligence, in the absence of the consent of the injured party, who had elected to bring his action at law in the Superior Court of the State of Washington and who made timely objection to the trial of the question of negligence, contributory negligence and assumed risk, and other defenses. The objection of the appellant to the jurisdiction of the court should have been sustained and the Court should have declined to pass upon the merits of the appellant's claim. Upon ascertaining that the owner was charged with knowledge and privity the proceedings should have been dismissed for lack of jurisdiction and the appellant allowed to proceed in the state court. (Apostles, p. 178 to 181.)

* * * * * The rights of seamen to recovery for injuries suffered originally defined by the common law (*The Osceola*, 189 U. S. 158; *Chelentis vs. Luckenbach*, 247 U. S. 372; *Carlisle vs. Sondanger*, 259 U. S. 255) have been extended by amendment to the Merchant Marine Act to conform to the Federal Employers Liability Act. (*Panama R. R. Co. vs. Johnson*, 264 U. S. 375; *Baltimore S. S. Co. vs. Phillips*, 274 U. S. 316; 46 U. S. C. A. Sec 688.) By these amendments the injured seaman is given the right to elect whether he shall proceed at common law before a jury or in admiralty. (*Panama R. R. Co. vs. Johnson, supra.*) One of the most important distinctions, if not the most important, between the right of the injured party to assert his claims in admiralty and at common law is the right to a trial by jury, and the effect of this legislation is to give the injured party a right to the determination of the question of negligence by a jury instead of by an admiralty court, if he so elects. The appellant, by bringing an action in the state court, made the election which the statute authorized him to made. (Apostles, p. 183.)

* * * * * The case is remanded to the trial court with directions to dismiss the case for want of jurisdiction to limit appellee's liability, without determination of the question of negligence of appellee or appellant and without passing upon the affirmative defenses to the claim of negligence advanced herein by the appellee." (Apostles, p. 185.)

10. Your petitioner advances the following reasons why this Honorable Court should grant the prayer of his petition:

(a) The decision of the Circuit Court of Appeals is in conflict with decisions of other Circuit Courts of Appeals on the same matter, and decides a Federal question in a way

in conflict with applicable decisions of this court, in that notwithstanding the District Court, who tried the cause, found and decreed that petitioner's vessel was in all respects seaworthy and properly and sufficiently equipped in all respects according to the usual and customary standards of the trade, that no negligence was proved to have existed upon the part of your petitioner in any wise contributing to the injuries and loss of claimant, and that the accident was solely and proximately caused by the willful negligence and carelessness of claimant in refusing and neglecting to follow instructions and use safety devices of the vessel supplied on board and in good order by the petitioner, and notwithstanding that the Circuit Court of Appeals made no findings and drew no conclusions to the contrary, and expressly declined to pass upon the question of seaworthiness or the negligence, if any, of your petitioner, nevertheless, the Circuit Court of Appeals holds that the District Court was without jurisdiction to hear and determine the cause on the merits, and should have dismissed the proceedings because the claimant merely alleged and contended before the State Court, and in this proceeding without substantiation of any proper proof thereon, that the vessel, in the same condition as when built, was unseaworthy in not having her chain plates covered with sheet metal.

The evidence without contradiction, being the evidence of the claimant, discloses that the chain plates and the con-

dition as to covering or absence of covering, first, was the usual, customary and standard construction and condition for vessels of her type and trade, and, second, the evidence wholly failed to show that the vessel's chain plates or her metal sheathing had any proximate connection with the accident to the claimant, claimant testifying that he did not see where the hook caught; no other witness testifying upon the subject. The decisions of the Circuit Court of Appeals, in substance on this point, is that, since the owner was on board as master, the District Court, without the taking of testimony on the question of negligence, should have held that the court was without jurisdiction to pass upon the merits of the case, and should first determine and decide the question of theoretical privity and knowledge upon the assumption that if petitioner should happed to have been negligent, or if the vessel should have happened to have been unseaworthy pursuant to claimant's unsupported contentions, the petitioner would have been privy to, and had known of the accident within the meaning of the Statute, and hence would not have been entitled to maintain the proceeding.

This is in conflict with the decisions of this court in the following cases:

Hartford Accident & Indemnity Co. vs. Southern Pacific Co., 273 U. S. 207; 71 L. Ed. 612.

The Benefactor, 102 U. S. 214; 26 L. Ed. 157;

The Benefactor, 103 U. S. 239; 26 L. Ed. 351;

La Bourgogne, 210 U. S. 95; 28 S. Ct. 664; 52 L. Ed. 973;

Providence & New York S. S. Co. vs. Hill Manufacturing Co., 109 U. S. 578; 27 L. Ed. 1038;

Butler vs. Boston & Savannah S. S. Co., 130 U. S. 527; 32 L. Ed. 1017;

Capitol Transportation Co. vs. Cambria Steel Co.,

The Benjamin Noble, 39 S. Ct. 292; 249 U. S. 334; 63 L. Ed. 631.

This decision is also in direct conflict with the decisions of several of the Circuit Courts of Appeals, as follows:

The 84-H, Appeal of Bouker Contracting Co. (C. C. A 2nd C), 296 Fed. 427;

Pocomoke Guano Co. vs. Eastern Transportation Co. (C. C. A. 4th C.), 285 Fed. 7;

Standard Wholesale Phosphate & Acid Works vs. Chesapeake Lighterage & Towing Co. (C. C. A. 4th C.), 16 Fed. (2nd) 765;

Petition of E. I. Du Pont de Nemours & Co. (C. C. A. 2nd C.), 19 Fed. (2nd) 354;

The Republic (C. C. A. 2nd C.), 61 Fed. 109;

The City of Camden (C. C. A. 3rd C.), 292 Fed. 97;

Quinlan vs. Pew (C. C. A. 1st C.), 56 Fed. 111

See also the following District Court decisions:

The Princess Sophio, 278 Fed. 180;

The Llewellyn J. Morse,—"Old Ironsides," 25 Fed. (2nd) 973.

(b) The Circuit Court held that solely by reason of the fact that the owner went to sea with his vessel as master,

and chanced to be an eye witness to the accident to claimant, under such circumstances, if the owner was liable to the extent of the value of the vessel, he must necessarily also be liable for the entire damage suffered by the claimant, the issue of unseaworthiness and negligence having been determined in the petitioner's favor by the trial court, upon the evidence produced by the claimant.

The petitioner in this case did not put in his evidence with reference to negligence and privity and knowledge in answer to the claimant's evidence for the case was brought to a close before the petitioner undertook to put in his evidence on these points. At the close of the claimant's case, following the petitioner's prima facie opening, the District Court sustained the petitioner's challenge to the sufficiency of the claimant's case and, therefore, none of the petitioner's evidence on the question of privity and knowledge, as well as negligence, is before the court. The petitioner was prepared to show the following facts which do not show in the record as it stands because the petitioner did not have his day in court, viz: that there are between three hundred and five hundred vessels, comprising substantially all of the American halibut fleet, similar to the "Aloha," having the same or similar design and construction with reference to back-stays and sheet metal covering as the petitioner's vessel; that this type of construction, including the sheet metal covering over the chain plates, is not only the usual and cus-

tomary construction for such vessels, but that petitioner, who was neither a naval architect nor a ship-builder, had exercised due care and caution in having his vessel designed for him by a competent naval architect and built by a competent ship-builder, and that, therefore, even if the court should have found that she was in fact unseaworthy as to the claimant, nevertheless petitioner was without knowledge and privity thereto within the meaning of the limitation of liability statute, and hence, in this case, the petitioner was not necessarily chargeable with knowledge and privity to the extent that he must necessarily have been liable for the entire damage to claimant, if liable at all, even if negligence were found to exist.

This decision of the Circuit Court of Appeals is in conflict with the following decisions of this Honorable Court and of the Courts of the Circuit Courts of Appeals and District Court, which have held, as the established rule, that if the owner has used due care and diligence in selecting skilled and competent experts in the repair or construction of his or its vessel, the owner will be entitled to limit his liability for the negligence of such agents, viz:

The Henrieta, 1929 A. M. C. 327.

Craig vs. Continental Ins. Co., 12 S. Ct. 97; 141 U. S. 638; 35 L. Ed. 886;

Butler vs. Hines, 278 Fed. 877 (C. C. A. 1921) Certiorari denied, 42 S. Ct. 185; 257 U. S. 659; 66 L. Ed. 421;

The Tommy, 151 Fed. 570; 81 C. C. A. 50;

The Annie Faxon, 75 Fed. 312; 21 C. C. A. 366;

The City of Camden (C. C. A. 1920) 269 Fed. 334;

The Harry Hudson Smith, 142 Fed. 724, 74 C. C. A., 56.

The 84-H, Appeal of Bouker Contracting Co. (C. C. A. 2nd C.), 296 Fed. 427;

Pocomoke Guano Co. vs. Eastern Transportation Co. (C. C. A. 4th C.), 285 Fed. 7.

The above decision is also at variance with the previously settled rule on the same point in the Ninth Circuit, viz:

Boston Marine Ins. Co. vs. Metropolitan Redwood Lumber Co., 197 Fed. 703; 117 C. C. A. 97;

The Suquamish, 1926 A. M. C. 1657, 15 Fed. (2nd) 166.

The decision of the Circuit Court of Appeals on this point is also in conflict with the weight of authority of the decisions of the District Courts, viz:

The Princess Sophia, 278 Fed. 180;

The Erie Lighter, No. 108, 250 Fed. 490;

The Muriel, 1928 A. M. C. 1005, 25 Fed. (2nd) 505;

The Commonwealth, 1929 A. M. C. 487, 31 Fed. (2nd) 142.

The Alola (D. C. Va. 1915) 288 Fed. 1006;

Van Eyken vs. Erie R. R. Co. (D. C. N. Y. 1902) 117 Fed. 712.

(c) The Circuit Court of Appeals holds, in its decision, that if the vessel should have been held unseaworthy, which

it was not, and if the petitioner should have been held negligent, which he was not, and hence should have been not entitled to limit his liability, that the District Court would have been, and hence, in any event, must be, without jurisdiction to retain the cause and decree full recovery to the exclusion of the pending proceeding in the State Court. The existing decisions express doubt and uncertainty as to whether or not the Admiralty Court has jurisdiction to retain a proceeding and grant full recovery to a claimant where limitation is denied, and where claimant had previously instituted suit in aonther court, viz:

> *In re The Titanic—Oceanic Steam Navigation Co.—Appeal of the Long Island Loan & Trust Co.*, 204 Fed. 295;
>
> Affirmed in principal, same case, 204 Fed. 260;
>
> *Huasteca Petroleum Co. vs. Cia de Navagacao Lloyd Brasileiro* (D. C. N. Y. 1924) 297 Fed. 318, 326.

The law on this point seems to have been definitely settled by this court in the case of *Hartford Accident & Indemnity Co. vs. Southern Pacific Co.*, 273 U. S. 207; 71 L. Ed. 612, and the decision of the Circuit Court of Appeals is squarely in conflict therewith.

The decision of the Circuit Court of Appeals is also in conflict with the decision of the District Court for the Southern District of New York, 1928.

> *The Linseed King—Petition of Spencer Kellogg & Sons Inc.*, 24 Fed. (2nd) 967.

The law on this point was held still uncertain notwithstanding the decision of this court in the case of *Hartford Accident & Indemnity Co. vs. Southern Pacific Co., supra,* by the District Court, Southern District of New York (1927), *in re Atlantic Gulf & West Indies S. S. Lines,* 20 Fed. (2nd) 975, and it appears, therefore, that the decision of the Circuit Court of Appeals upon this important question of general law is in a manner apparently untenable and in conflict with the weight of authority, and if the case of *Hartford Accident & Indemnity Co. vs. Southern Pacific Co., supra,* is not controlling, then the point has not been but should be settled by this court.

(d) In its decision, the Circuit Court of Appeals holds that the jurisdiction of the Admiralty Court for personal injury to a seaman, under a petition for limitation of liability by the owner, is dependent upon the consent of the seaman, and cannot be sustained if the seaman elects to bring his action before a jury in a common law court. This is in direct conflict with decisions of this court, the Circuit Courts of Appeals and the District Courts of the United States, in that, *first,* the jurisdiction of the Federal Courts is limited and controlled by law and cannot be conferred by consent, and want of jurisdiction, cannot be waived, modified or affected at the discretion or election of any party, viz:

King Iron Bridge Co. vs. Otoe County, 120 U. S. 225; 30 L. Ed. 623; 7 S. Ct. 552;

New England National Bank vs. Calhoun, C. C. A. (N. M.) 9 Fed. 2nd, 272;

Highway Construction Co. vs. McClelland, C. C. A. (Mo.) 14 Fed. 2nd, 406;

Danks vs. Gordon, C. C. A. (N. Y.) 272 Fed. 821;

New York Life Ins. Co. vs. Johnson, C. C. A. (Iowa) 255 Fed 958;

Prez vs. Canadian Land & Fur Co., D. C. (La.) 14 Fed. 2nd, 181;

McLaughlin vs. Western Union Tel. Co., D. C. (La.) 7 Fed. 2nd, 177;

Rosenberg vs. Shuler, D. C. (Okl.) 289 Fed. 820.

And, *second*, the decision of the Circuit Court of Appeals, that the jurisdiction of the Admiralty Court under a petition for limitation of liability, should be dismissed for want of jurisdiction at the instance of a seaman who declares an election to prosecute his claim before a jury in a court of law, is squarely in conflict with the decision of this court in the case of

The Edward, In re East River Towing Co. Inc. (N. Y. 1924) 266 U. S., 355; 45 S. Ct. 114; 69 L. Ed. 324.

Upon the same point the decision of the Circuit Court of Appeals is in direct conflict with two decisions of the Circuit Court of Appeals for the Second Circuit, viz:

In re Petition of Union Sulphur Co. (C. C. A., N. Y. 1924) 5 Fed. 2nd, 1023.

The Clarence P. Howland (C. C. A., N. Y. 1925) 6 Fed. 2nd, 791.

(e) For the further reasons advanced in the brief supporting this application, your petitioner is advised and believes that the determination of the Circuit Court of Appeals in the instant case was erroneous and in conflict with the decisions of this Honorable Court, the decisions of the various Circuit Courts of Appeals and the decisions of the various District Courts.

WHEREFORE, Your petitioner respectfully prays that a Writ of Certiorari may issue, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that court to certify and send to this court a full and complete transcript of the record of all proceedings of said court in the above entitled cause, to the end that said cause may be reviewed and determined by this court as provided by the law.

And your petitioner will ever pray.

AXEL LANGNES, *Petitioner.*

By IRA BRONSON,

State of Washington,
Western District of Washington, } *SS.*
Northern Division.

IRA BRONSON, being first duly sworn, says that he is one of the Proctors for Axel Langnes, the petitioner herein, and a member of the bar of the above entitled court, and makes this verification for and on behalf

of said petitioner for the reason that the said petitioner is not within the jurisdiction; that he has read said petition subscribed by him, and that the facts therein stated are true to the best of his knowledge and belief.

IRA BRONSON.

Subscribed and sworn to before me this 25th day of January, 1930.

E. W. PARKS,

Notary Public in and for the State of Washington, residing at Seattle.

I hereby certify that I have examined the foregoing petition. In my opinion the petition is well founded and the cause is one in which the prayer of the petitioner should be granted by this Honorable Court.

IRA BRONSON,

FILE COPY

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In the Supreme Court
OF THE
United States

October Term

No. [redacted] 38

AXEL LANGNES, Owner of the Diesel Halibut Vessel, "ALOHA," Her Engines, etc.,

Petitioner,

vs.

WINFIELD A. GREEN, Claimant,

Respondent.

BRIEF IN SUPPORT OF

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

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INDEX

	Page
Statement of Proceedings	1
Jurisdiction on Certiorari	3
Statement of Facts	4
Decision of Circuit Court of Appeals	8
Specification of Errors	12
Error No. 1	12
Error No. 2	15
Error No. 3	21
Error No. 4	23
Error No. 5	27

TABLE OF CASES

	Page
Aloha, The ("Aloha," 1929, A.M.C. 1642)	8
Alola, The, 288 Fed. 1006	14
Annie Faxon, The, 75 Fed. 312	14
Appeal of Bouker Contracting Co., the 84-H, 296 Fed. 427	14, 20, 23
Atlantic Gulf & West Indies S.S. Lines, In re, 20 Fed. (2nd) 975	27
Benefactor, The, 103 U. S. 239, 102 U. S. 214	13-22
Benjamin Noble, The, 249 U. S. 334	13-22
Boston Marine Ins. Co. vs. Metropolitan Redwood Lumber Co., 197 Fed 703	14-20
Butler vs. Boston & Savannah S. S. Co., 130 U. S. 527	13-20-22
Butler vs. Hines, 278 Fed. 877	14
Capitol Transportation Co. vs. Cambria Steel Co., 249 U. S. 334	13-22
City of Camden, The, 269 Fed. 334	14-23
Clarence P. Howland, The, 6 Fed. (2nd) 791	29
Commonwealth, The, 31 Fed. (2nd) 142	14-20-21
Craig vs. Continental Ins. Co., 141 U. S. 638	14
Danks vs. Gordon, 272 Fed. 821	28
Edward, The, in re East River Towing Co., Inc., 266 U. S. 355	29
E. I. Du Pont de Nemours & Co., Petition of, 19 Fed. (2nd) 354	18-23
Erie Lighter, No. 108, The, 250 Fed. 490	14
Flink vs. Paladini, 279 U. S. 58	13
Harry Hudson Smith, The, 142 Fed. 724	14
Hartford Accident & Indemnity Co. vs. Southern Pacific Co., 273 U. S. 207	13, 20, 22, 24, 25-27
Highway Construction Co. vs. McClelland, 14 Fed. (2nd) 406	28

Henrietta, The, 1929 A. M. C. 327, 328.....13, 14
Huasteca Petroleum Co. vs. Cia de Navagacao Lloyd Brasileiro (D.C.N.Y. 1924) 297 Fed. 318, 326..... 24
King Iron Bridge Co. vs. Otoe County, 120 U.S. 225..... 28
La Bourgogne (Deslions vs. LaCompagnie Generale Transalantique, 210 U. S. 95.....13-20-22
Linseed King, The, Petition of Spencer Kellogg & Sons, Inc., 24 Fed. (2nd) 967..... 27
Llewellyn J. Morse, The—"Old Ironsides," 25 Fed. (2nd) 973 18-23
McLaughlin vs. Western Union Tel. Co., 7 Fed. (2nd) 177 28
Muriel, 1928 A.M.C. 1005..... 14
New England National Bank vs. Calhoun, 9 Fed. (2nd) 272..... 28
New York Life Ins. Co. vs. Johnson, 255 Fed. 958..... 28
Perez vs. Canadian Land & Fur Co., 14 Fed. (2nd) 181.... 28
Pocomoke Guano Co. vs. Eastern Transportation Co., 285 Fed. 7.....14, 20-23
Providence & New York S. S. Co. vs. Hill Mfg. Co., 109 U. S. 578.....13-18-20-22-24
Princess Sophia, The, 278 Fed. 180.....14, 18, 23
Quinlan vs. Pew, 56 Fed. 111..... 23
Republic, The, 61 Fed. 109..... 23
Richardson vs. Harmon, 222 U. S. 96..... 13
Rosenberg vs. Shuler, 289 Fed. 820..... 28
Standard Wholesale Phosphate & Acid Works vs. Chesapeake Lighterage & Towing Co., 16 Fed. (2nd) 765 18-23
Suquamish, The, 1927 A.M.C. 1657.....14, 20
Titanic, The—Oceanic Steam Navigation Co.—Appeal of the Long Island Loan & Trust Co., 204 Fed. 295.... 24
Tommy, The, 151 Fed. 570..... 14
Union Sulphur Co., In re Petition of, 5 Fed. (2nd) 1023.... 29
Van Eyken vs. Erie R. R. Co., 117 Fed. 712..... 14

TEXT WRITERS

Benedict on Admiralty (5th ed.) Secs. 355 & 361 and cases cited 17-18

COURT RULES AND STATUTES

Judicial Code, Sec. 240..... 3
Revised Statutes, Secs. 4283, 4284 and 4285.....10, 11
Revised Statutes, Sec. 954..... 17
General Admiralty Rule No. 23..... 17
46 U. S. A. Sec. 688 (Merchant Marine Act of June 20, 1920, Sec. 33).....10-28

IN THE

Supreme Court of the United States

October Term

AXEL LANGNES, Owner of the Diesel Halibut Vessel, "ALOHA," Her Engines, etc.,

Petitioner,

vs.

WINFIELD A. GREEN, Claimant,

Respondent.

BRIEF IN SUPPORT OF

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

STATEMENT

This cause originated by petitioner filing a petition for exemption from or limitation of liability in the United States District Court for the Western District of Washington, Northern Division, as the owner of the American diesel halibut vessel "ALOHA," Honorable Jeremiah Neterer, Judge. In said proceeding respondent appeared below as claimant, and from a final decree of the District Court, entered March 4th, 1929, (Apostles, page 148) dismissing claimant's claim and granting total exemption to petitioner,

claimant appealed to the United States Circuit Court of Appeals for the Ninth Circuit. The opinion of the Circuit Court of Appeals was rendered and filed October 21st, 1929. (Apostles, pages 174-186, reported 1929 A. M. C. 1642).

On the 21st day of October, 1929, the decree of the Circuit Court of Appeals was entered and filed, remanding the proceedings to the District Court with directions to dismiss the case for want of jurisdiction to limit petitioner's liability, without determination of the question of negligence of the petitioner, or claimant, and without passing upon petitioner's affirmative defenses, and with costs to claimant. (Apostles, pages 180-6.)

On November 20, 1929, a petition for rehearing was filed by the petitioner in the Circuit Court of Appeals, and, after consideration, said petition for rehearing was by said Circuit Court of Appeals, denied on the 2nd day of January, 1930 (Apostles, page 188).

On January 2nd, 1930, upon application of the petitioner's proctors, the Circuit Court of Appeals entered and filed an order staying mandate to and including January 31, 1930, in the event petition for writ of certiorari be made and docketed in this Court on or before said last mentioned date. (Apostles, p. 188.)

Petitioner now makes application to this Honorable Court for a writ of certiorari to be directed to said Honorable Circuit Court of Appeals for the Ninth Circuit, to the end that said cause may be reviewed and determined according to law.

The jurisdiction of this Court is invoked under Sec. 240 of the Judicial Code, 28 U. S. C. A., Sec. 347, reading in part as follows:

> "Sec. 347. (Judicial Code, section 240, amended.) Certiorari to Circuit Court of Appeals and Court of Appeals of District of Columbia; appeal or writ of error to Supreme Court from Circuit Courts of Appeals in certain cases; other reviews not allowed. (a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.
>
> "(b) (No State Statute being involved, this sub-section is not pertinent.)
>
> "(c) No judgment or decree of a Circuit Court of Appeals, or of the Court of Appeals of the District of Columbia, shall be subject to review by the Supreme Court otherwise than as provided in this section. (Mar. 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Mar. 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 938.)"

STATEMENT OF FACTS

The pertinent facts of the case, stated briefly, are that petitioner was the sole owner of a diesel American halibut vessel, operating to the Alaska halibut banks from Seattle. Halibut fishing is done on the basis of "lays," according to a standard custom of the trade, on the basis of shares in the proceeds of each voyage. First, one-fifth of the gross proceeds is allowed to the vessel, as the vessel's share, then all of the expenses of the voyage are deducted, and the remainder is divided equally, share and share alike, between the Master, who is usually the owner or part owner, and all the other members of the crew. No articles are signed, and no written or oral contracts or agreements are entered into, other than the standard oral understanding as to customary division of the "lays," and the designation by the Captain of certain men to perform special duties, in addition to fishing, such as engineer, cook, etc. No person aboard is an employer, and no person aboard an employee.

On the 13th day of May, 1928, petitioner's vessel, the "ALOHA," so manned, with petitioner, the owner, aboard as Master and fisherman, and the claimant, Winfield A. Green, aboard as engineer and fisherman, was at sea, fishing for halibut off Cape St. James, Queen Charlotte Island, British Columbia.

At the time of the accident involved herein, respondent was standing at the rail, in the waist of the vessel, tending the ground line, a long line approximately 1,800 ft. in length, which is stretched along the bottom of the ocean, and to which are attached, at intervals of 13 feet, leaders or "gangions" 52 inches in length with baited halibut hooks on their extremities. After this line has remained on the ocean bottom a certain period of time, one end is taken aboard the vessel, passed around a power driven capstan or "gurdy," and the entire ground line gradually hove aboard the vessel over a roller on the vessel's rail, the respondent's duties being to remove any fish from the hooks, and to disentangle and free the hooks and leaders as the gear was taken aboard, a lever for the purpose of starting and stopping the capstan being adjacent to his hand at the rail of the vessel.

During this operation, a hook caught some place over the side of the vessel, either upon some part of the vessel or her hull, or other parts of the ground line, and snapped loose from the strain of the winch, flying inboard and striking respondent in the eye, occasioning substantial injury.

The evidence in the case, consisting of all of claimant's evidence and the opening evidence of the peti-

tioner, does not disclose where the hook caught before snapping free and hitting respondent.

Respondent instituted suit for damages against the petitioner for $25,000.00 in the Superior Court of the State of Washington, and requested a jury trial.

Before trial of that cause, petitioner filed his petition for exemption from, or in the alternative, limitation of liability in the United States District Court for the Western District of Washington, Northern Division, before Honorable Jeremiah Neterer, Judge. Stipulation for value of the vessel and her earned and pending share of the proceeds, together with the petitioner's individual share, in the sum of $5,000.00 was approved by respondent, and filed in the limitation proceedings, and proceedings in the State Court were thereupon enjoined.

But one claimant appeared in the limitation proceedings, being the respondent, his claim being for $25,000.00 personal injury damages.

Claimant excepted to the petition upon the grounds that the Admiralty Court was without jurisdiction to proceed because: first, but one claim was involved; and second, that it appeared that the owner was on board as Master, and the respondent sought recovery upon the claim that the vessel was unseaworthy as built.

The District Court overruled the exceptions, and, at the close of claimant's evidence upon the contentions of privity and knowledge and the unseaworthiness of the vessel, found that the vessel was seaworthy in all respects; that no negligence on the part of the petitioner was shown, nor any act of commission or omission of imposed duty upon his part; that the vessel and her construction were not shown to have had any proximate connection with the cause of the claimant's injury; that the construction of the vessel was according to the usual and customary standard and design; and that the accident and injury to respondent was occasioned to respondent, an experienced fisherman, solely and proximately as the result of his own negligence and carelessness in wilfully failing to carry out his duties in the known and proper manner. (Apostles pps. 139-146.)

The District Court further found and decreed that the loss, damage and injury to the respondent "was not caused by the design or neglect of the petitioner, Axel Langnes, and did not occur with the privity or knowledge of said petitioner. That the said petitioner be and he is hereby forever exempt and discharged from all loss, damage, destruction or injury arising from or growing out of said occurrence happening on board said vessel." (Apostles, page 151.)

DECISION OF CIRCUIT COURT OF APPEALS

Upon the foregoing facts, findings, conclusions and decree of the District Court, the Honorable Circuit Court of Appeals, on the 21st day of October, 1929, entered and filed its decision (Apostles, page 174) (reported as the "ALOHA," 1929, A. M. C. 1642), holding, in substance, that:

1st. The petitioner did not allege that the accident happened without his privity and knowledge.

2nd. That since it appeared from the pleadings that the petitioner, the owner, was on board his vessel as Master, the District Court was without jurisdiction to hear and determine the case, and should have dismissed the entire proceeding on the theory that if the petitioner were found to be liable at all, he must necessarily have been privy to and have had knowledge of the cause of the accident, and hence would not be entitled to secure limitation in any event.

3rd. That the right of an owner to maintain a proceeding under the limitation of liability statute is dependent upon:

(a) The theoretical question of whether or not the owner would be entitled to limit his liability, if he should be found negligent at all; and

(b) That this theoretical question is, in turn, independent of and should be determined independently of the question of whether or not the owner is actually negligent, either directly or by imputation of law, that is to say, *is independent of the actual facts of the case,* and is dependent upon the nature of the negligence *alleged* by the injured party as a basis for his recovery, and on the relation of the owner to such allegations, whether true or unfounded.

4th. That the only persons involved in the accident were the owner and Master, as petitioner, and the respondent, and

(a) Therefore, there was no basis for limitation of the liability of the owner upon a claim of negligence based upon *alleged* insufficiencies of the vessel's construction, as built, since, if the owner was liable to the extent of the value of the vessel, he must also necessarily have been liable for the entire damage suffered by the respondent.

5th. That upon the statement of the foregoing propositions, the District Court had no jurisdiction to proceed and pass upon the merits of the case, or to determine whether or not such allegations by the claimant were true, or if true, whether they constituted negligence of the owner in fact, directly or by imputation, *in the absence of the consent of the injured party, who had elected to bring his action at law*

in the Superior Court of the State of Washington before a jury.

6th. That the objection of the respondent to the jurisdiction of the court should have been sustained, and the court should have declined to pass upon the merits of the respondent's claim, and upon ascertaining that the owner was aboard and that it was alleged by the claimant that his injuries were occasioned with the knowledge and privity of the owner, that the proceeding should have been dismissed for lack of jurisdiction and the respondent allowed to proceed in the State Court.

7th. That by virtue of the provisions (Sec. 33) of the Merchant Marine Act of June 5th, 1920, 46 U. S. C. A., Sec. 688, the injured seaman is given the right to elect whether he shall proceed at common law before a jury, or in admiralty, notwithstanding the institution of a proceeding by the owner in a Court of Admiralty, seeking exemption from, or in the alternative, limitation of his liability, pursuant to Revised Statutes, Sec. 4283, 46 U. S. C. A. 183, reading as follows:

> "Liability of owner not to exceed interest. The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done,

occasioned, or incurred without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

And Revised Statutes, Sec. 4284, 46 U. S. C. A., 184, reading as follows:

"Apportionment of compensation. Whenever any such embezzlement, loss, or destruction is suffered by several freighters or owners of goods, wares, merchandise, or any property whatever, on the same voyage, and the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses; and for that purpose the freighters and owners of the property, and the owner of the vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto."

And Revised Statutes, Sec. 4285, 46 U. S. C. A. 185, reading as follows:

"Transfer of interest of owner to trustee. It shall be deemed a sufficient compliance on the part of such owner with the requirements of this chapter relating to his liability for any embezzlement, loss, or destruction of any property, goods, or merchandise, if he shall transfer his interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, to act as such trustee for the person who may prove to be legally entitled thereto; from and after which transfer

all claims and proceedings against the owner shall cease."

8th. That without determination of the question of negligence of the owner or respondent, or without passing upon the affirmative defenses of the owner, the case should be remanded to the trial court, with directions to dismiss the case for want of jurisdiction, and respondent allowed to prosecute his claim in the State Court before a jury.

SPECIFICATION OF ERRORS

Petitioner respectfully submits that the Honorable Circuit Court of Appeals erred, and that its decision is in conflict with the decisions of this Honorable Court on the same matter; that by its decision the Circuit Court of Appeals has decided an important question of general law in a way probably untenable, and in conflict with the weight of authority, and has decided an important question of Federal law, which, if not already settled, should be settled by this Court in the following respects, viz:

Error No. 1

The literal effect of the decision of the Circuit Court of Appeals is to deny to all owners, or part owners, who go to sea with their ships as Masters, or otherwise, and who constitute the majority of the fishing fleets of the United States, the benefits of the

limitation of liability statutes, contrary to the purpose and intention of such statutes, and contrary to the established rule requiring liberal interpretation of the "privity and knowledge" provision of the same.

The Benefactor, 103 U. S. 239; 26 L. Ed. 351;

Providence & New York S. S. Co. vs. Hill Manufacturing Co., 109 U. S. 578; 26 L. Ed., 1038, 3 S. Ct. 379;

La Bourgogne (Deslions vs. LaCompagnie Generale Transalantique), 210 U. S. 95, 120; 52 L. Ed. 973, 985; 28 S. Ct. 664;

Butler vs. Boston & Savannah S. S. Co., 130 U. S. 527; 32 L. Ed. 1017;

Richardson vs. Harmon, 222 U. S. 96, 103; 56 L. Ed. 110, 113; 32 S. Ct. 27;

Flink vs. Paladini, 279 U. S. 58; 73 L. Ed. 613;

Capitol Transportation Co. vs. Cambria Steel Co.—The Benjamin Noble, 249 U. S. 334; 63 L. Ed. 631; 39 S. Ct. 292;

Hartford Accident & Indemnity Co. vs. Southern Pacific Co., 273 U. S. 207; 71 L. Ed. 612; 47 S. Ct. 357; 1927 A. M. C. 402;

The Henrietta, 1929 A. M. C. 327, 328.

There appears to be no sound reason why an individual owner, who goes to sea with his vessel, should not stand on equal ground with a corporate owner, or an individual owner, who does not go to sea with his ship, under the well established rule that if the owner uses due care and diligence in selecting

skilled and competent experts in the repair or construction of his vessel, the owner will be entitled to limit his liability for the negligence of such agents.

The Henrietta, 1929 A. M. C. 327;

Craig vs. Continental Ins. Co., 141 U. S. 638; 35 L. Ed. 886, 12 S. Ct. 97;

Butler vs. Hines, (C. C. A.) 278 Fed. 877;

The Tommy, 151 Fed. 570; 81 C. C. A. 50;

The Annie Faxon, 75 Fed. 312; 21 C. C. A. 366;

The City of Camden (C. C. A.) 269 Fed. 334;

The Harry Hudson Smith, 142 Fed. 724, 74 C. C. A. 56;

The 84-H, Appeal of Bouker Contracting Co., (C. C. A.) 296 Fed. 427;

Pocomoke Guano Co. vs. Eastern Transportation Co. (C. C. A.) 285 Fed. 7.

Boston Marine Ins. Co. vs. Metropolitan Redwood Lumber Co., 197 Fed. 703; 117 C. C. A. 97;

The Suquamish, 1927 A. M. C. 1657; 15 Fed. (2nd) 166;

The Princess Sophia, 278 Fed. 180;

The Erie Lighter, No. 108, 250 Fed. 490;

The Muriel, 1928 A. M. C. 1005; 26 Fed. (2nd) 505;

The Commonwealth, 1929 A. M. C. 487; 31 Fed. (2nd) 142;

The Alola, 288 Fed. 1006;

Van Eyken vs. Erie R. R. Co., 117 Fed. 712.

Error No. 2

The Circuit Court holds that the petitioner did not allege that the accident happened without his privity and knowledge, simply because he did not use the specific words "privity or knowledge."

The petitioner, in substance, by obvious intendment, and in legal effect, alleged that the accident did not happen with his privity or knowledge.

The title of the petition discloses that the petitioner seeks not only exemption from, but, in the alternative, *limitation* of liability.

In the fourth article, it is alleged that the vessel was in all respects *seaworthy* and efficiently officered, manned, equipped and furnished, and well and sufficiently *fitted* and *supplied* with suitable engines, machinery, tackle, apparel, appliances and furniture, all in good order and condition and suitable for the business in which said vessel was engaged upon said voyage, and further, that the owner of said vessel at all times had exercised *due care and diligence to make said vessel in all respects seaworthy, etc.*

In the ninth article, it is alleged that the casualty was *due solely* to the negligence and carelessness of the claimant.

In the thirteenth article, it is alleged that the petitioner desires to claim the benefits of Sees. 4283, 4284 and 4285 of the Revised Statutes of the United States, and Acts amendatory thereof and supplemental thereto, and *further* desires to test his liability and the liability of the "ALOHA" to any extent whatever for the alleged loss.

Furthermore, in the prayer of the petition, the petitioner prays:

> "That the court in this proceeding will adjudge that petitioner and the said M. S. "ALOHA" are not, and neither of them is, liable to any extent for said loss, damage and injury; *or if it shall adjudge that they, or either of them, are liable then that the liability of petitioner be limited to the amount of the value of his interest in said vessel and the accrued share of the proceeds belonging to the said vessel and said petitioner at the close of said voyage.*" (Italics ours.)

It is, therefore, respectfully submitted that if the words "privity or knowledge" in the petition by the pleader constituted a technical insufficiency of pleading, it was purely one of form, and not one of substance, and if material, was curable by simple amendment, and would not justify the summary dismissal of the entire proceedings.

Under the established principles of Admiralty practice, the technical severity of common law pleading, with reference to unintended omissions, has been

surplanted by the established principle of procedure conforming to substantive justice and liberal right of amendment.

Revised Statutes, Sec. 954; 28 U. S. C. A. Sec. 777, provides as follows:

> "Defects of form; amendments. No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."

General Admiralty Rule No. 23;

Benedict on Admiralty (5th Ed.) Secs. 355 and 361 and cases cited.

Furthermore, were the omission of the use of the words "privity or knowledge" of substantive importance in the pleading, any insufficiency in this respect was cured by the evidence and the decree of the trial court based thereon, viz:

"That the accident described in the libel and petition herein and the loss, destruction, damage and injury arising therefrom, was not caused by the design or neglect of the petitioner, Axel Langnes, and did not occur with the privity or knowledge of said petitioner." (Apostles p. 148 et. seq.)

Benedict on Admiralty, (5th Ed.) Sec. 355 (and cases cited).

It is the settled rule that the issue of privity and knowledge is to be determined not upon the pleadings, but upon all the evidence.

Providence & New York S. S. Co. vs. Hill Manufacturing Co., 109 U. S. 578; 27 L. Ed. 1038;

Standard Wholesale Phosphate & Acid Works vs. Chesapeake Lighterage & Towing Co. (C. C. A.), 16 Fed. (2nd) 765;

Petition of E. I. Du Pont de Namours & Co., 19 Fed. (2nd) 354;

The Princess Sophia, 278 Fed. 180;

The Llewellyn J. Morse—"Old Ironsides," 25 Fed. (2nd) 973.

If the decision of the Circuit Court of Appeals, that the petition failed to allege that the accident did happen without his privity and knowledge, were justifiable from the evidence, and the decree of the District Court is to be reversed upon that ground, then the case should not be dismissed, but remanded for further proceedings, since the petitioner in this case

did not put in his evidence with reference to negligence and privity and knowledge in answer to the claimant's evidence, for the case was brought to a close before the petitioner undertook to put in his evidence on these points. At the close of the claimant's case, following the petitioner's prima facie opening, the District Court sustained the petitioner's challenge to the sufficiency of the claimant's case and, therefore, none of the petitioner's evidence on the question of privity and knowledge, as well as the question of negligence, is before the court. The petitioner was prepared to show the following facts, which do not appear in the record as it stands, because petitioner has not yet had his day in court, viz:

That there are between three hundred and five hundred vessels similar to the "ALOHA," having the same or similar design and construction with reference to back-stays and sheet metal covering as the petitioner's vessel: that this type of construction, including the absence of sheet metal covering over the chain plates, is not only the standard, usual and customary construction for such vessels, but that petitioner, who was neither a naval architect, nor a shipbuilder, but a fisherman, had exercised due care and caution in having his vessel designed for him by a competent naval architect, and built precisely as she

was at the time of the accident by a competent shipbuilder, and that, therefore, even if the court should have found that her construction was such that she was unseaworthy in the respects alleged by the claimant, nevertheless, petitioner was without privity and knowledge thereof and thereto within the meaning of the statute, and, hence, in this case, the petitioner was not necessarily chargeable with knowledge and privity, even if negligence were found, to the extent that he must have been liable for the entire damage to rspondent, if liable at all.

Providence & New York S. S. Co. vs. Hill Mfg. Co., 109 U. S. 578; 27 L. Ed. 1038;

La Bourgogne, 210 U. S. 95; 52 L. Ed. 973; 28 S. Ct. 664;

Butler vs. Boston & Savannah S. S. Co., 130 U. S. 527; 32 L. Ed. 1017;

Hartford Accident & Indemnity Co. vs. Southern Pacific Co., 273 U. S. 207; 71 L. Ed. 612;

The 84-H, Appeal of Bouker Contracting Co. (C. C. A.) 296 Fed. 427;

Pocomoke Guano Co. vs. Eastern Transportation Co. (C. C. A.), 285 Fed. 7;

Boston Marine Ins. Co. vs. Metropolitan Redwood Lumber Co., 197 Fed. 703; 117 C. C. A. 97;

The Suquamish, 1926 A. M. C. 1657; 15 Fed. (2nd) 166;

The Commonwealth, 1927 A. M. C. 487; 31 Fed. (2nd) 142.

It appears from the evidence in this case that the respondent was not an employee of the petitioner, but that both parties were engaged upon a common venture, having many of the characteristics of a joint enterprise, and the petitioner in this case, therefore, was entitled to show that many duties, obligations and responsibilities with reference to the condition, upkeep, maintenance and repair of the vessel's appliances, rigging and fishing gear, were, in fact and in legal effect, delegated by the owner and Master to the other fishermen on board, including the respondent, and, hence, the owner in this case should not be held to such strict standards of accountability as in the usual case, but rather that the generally liberal construction of the knowledge and privity provision of the statute should be still more liberally construed with reference to the petitioner in the case at bar.

The Commonwealth, 1929 A. M. C. 487; 31 Fed. (2nd) 142.

Error No. 3

The Circuit Court of Appeals erred in holding that, since the owner was on board as Master, the District Court, without the taking of testimony on the question of negligence, or upon such testimony as was taken, should have held that that Court was without jurisdiction to pass upon the merits of the case, and should have *first* determined and decided the ques-

tion of theoretical privity and knowledge, which might have existed, if any negligence should have been found upon the part of the petitioner, upon the assumption that if petitioner should have happened to have been negligent, or if the vessel should have happened to have been unseaworthy, pursuant to claimant's unsupported contentions, the petitioner must necessarily have been privy to and had knowledge of the accident within the meaning of the statute, and that the Court should dismiss the case for lack of jurisdiction.

It is respectfully submitted that this ruling of the Circuit Court of Appeals is in conflict with the decisions of this Court in the following cases:

Hartford Accident & Indemnity Co. vs. Southern Pacific Co., 273 U. S. 207; 71 L. Ed. 612;

The Benefactor, 102 U. S. 214; 26 L. Ed. 157;

The Benefactor, 103 U. S. 239; 26 L. Ed. 351;

La Bourgogne, 210 U. S. 95; 28 St. Ct. 664; 52 L. Ed. 973;

Providence & New York S. S. Co. vs. Hill Mfg Co., 109 U. S. 578; 27 L. Ed. 1038;

Butler vs. Boston & Savannah S. S. Co., 130 U. S. 527; 32 L. Ed. 1017;

Capitol Transportation Co. vs. Cambria Steel Co.—The Benjamin Noble, 39 S. Ct. 292; 249 U. S. 334; 63 L. Ed. 631.

This decision is also in direct conflict with the decision of several of the Circuit Courts of Appeals as follows:

The 84-H, Appeal of Bouker Contracting Co. (C. C. A.) 296 Fed. 427;

Pocomoke Guano Co. vs. Eastern Transportation Co., (C. C. A.) 285 Fed. 7;

Standard Wholesale Phosphate & Acid Works vs. Chesapeake Lighterage & Towing Co. (C. C. A.) 16 Fed. (2nd) 765;

Petition of E. I. Du Pont de Nemours & Co. (C. C. A.) 19 Fed. (2nd) 354;

The Republic (C. C. A.) 61 Fed. 109;

The City of Camden (C. C. A.) 292 Fed. 97;

Quinlan vs. Pew (C. C. A.) 56 Fed. 111.

See also the following District Court decisions:

The Princess Sophia, 278 Fed. 180;

The Llewellyn J. Morse—"Old Ironsides," 25 Fed. (2nd) 973.

Error No. 4

The Circuit Court of Appeals erred in directing the dismissal of the case upon what is respectfully submitted as a fundamentally erroneous theory, namely: that if the vessel should have been held unseaworthy, which it was not, and if the petitioner should have been negligent, which he was not, and hence should not have been entitled to limit his liability, that the District Court would then have been, and hence,

irrespective of the petitioner's negligence, must be without jurisdiction to retain the cause and decree full recovery to claimant if the facts so warranted to the exclusion of the pending proceeding in the State Court.

The early decisions on this point, though expressing some uncertainty on the subject, are in conflict with this decision of the Circuit Court of Appeals, viz:

> *In re The Titanic—Oceanic Steam Navigation Co.—Appeal of the Long Island Loan & Trust Co.*, 204 Fed. 295;
>
> Affirmed in principal, 204 Fed. 260;
>
> *Huasteca Petroleum Co. vs. Cia de Navagacao Lloyd Brasileiro* (D. C. N. Y. 1924) 297 Fed. 318, 326.

In addition to being apparently untenable and in conflict with this Court's decision as to the scope, purpose and effect of the limitation of liability statute, as set forth in the case of *Providence & New York S. S. Co. vs. Hill Mfg. Co.*, 109 U. S. 578; 27 L. Ed. 1038, this ruling of the Circuit Court of Appeals seems to be squarely in conflict with the decision of this Court in the case of *Hartford Accident & Indemnity Co. vs. Southern Pacific Co.*, 273 U. S. 207; 71 L. Ed. 612.

With the rendition of the last mentioned decision, we believe the law to be settled that, if the amount of the claim or claims against an owner exceeds the value of the vessel and her pending freight at the end of the voyage, and if the owner invokes the jurisdiction of the Admiralty Court under the limitation of liability statute, and places the Court in the possession of the vessel and her freight, or in lieu thereof a stipulation for value therefor, then, and in that event, the Admiralty Court has full jurisdiction and authority, and it is its duty, to retain jurisdiction of the cause, and decree appropriate relief to all parties, as well when limitation is denied, as when limitation is granted.

As Justice Taft so ably observes in the last mentioned decision:

> "It is quite evident from these cases that this court has by its rules and decisions given the statute a very broad and equitable construction for the purpose of carrying out its purpose and for facilitating a settlement of the whole controversy over such losses as are comprehended within it, and that all the ease with which rights can be adjusted in equity is intended to be given to the proceeding. It is the administration of equity in an admiralty court. *Dowdell vs. U. S. Dist. Ct.* 71 C. C. A. 288, 139 Fed. 444, 445. The proceeding partakes in a way of the features of a bill to enjoin the multiplicity of suits, a bill in the nature of an interpleader, and a creditor's bill. It looks to a complete and just disposition of a many cor-

nered controversy and is applicable to proceedings in rem against the ship as well as to proceedings in personam against the owner, the limitation extending to the owner's property as well as to his person.

The City of Norwich, supra.

"With this general view of the statute, we come to the contention of the petitioner in this case. He says that the owner only brings the suit to limit his liability, if it exists, to the vessel and the freight for the voyage. If he fails in his purpose and does not establish the limitation, no progress can be made in behalf of the defendant or the claimants in the collection of what has been found due them, and because he has lost that feature of his suit against them, the case must be dismissed. * * * The parties, it is argued, must thereafter be remitted to a common law or equity court of the state to secure their rights, unless diverse citizenship or the admiralty character of their claims entitles them to resort to, or remain in, a Federal court.

"Surely the admiralty court, in view of the large powers intended to be given it in such a proceeding, is not so helpless as this. So to hold would be to hold that unless the petitioner wins, the court does not have power to administer justice. There is nothing in the statute nor in the rules that requires so feeble a conclusion. * * * If Congress has constitutional power to gather into the admiralty court all claimants against the vessel, and its owner, whether their claims are strictly in admiralty or not, as this court has clearly held, it necessarily follows as incidental to that power that it may furnish a complete remedy for the satisfaction of those claims by distribution of the res and by judgments in personam for deficiencies against the owner if not released by virtue of the statute. * * * * * But this lim-

itation of liability proceeding differs from the ordinary admiralty suit, in that by reason of the statute and rules, the court of admiralty has power (*Providence & N. Y. S. S. Co. vs. Hill Mfg. Co.*, 109 U. S. 578, 27 L. Ed. 1038, 3 Sup. Ct. Rep. 379, 617) to do what is exceptional in a court of admiralty—to grant an injunction, and by such injunction bring litigants, who do not have claims which are strictly admiralty claims, into the admiralty court (Benedict, Admiralty, 5th Ed. Sec. 70, note 97). There necessarily inheres therefore in the character of the limitation of liability proceeding in reference to such non-admiralty claims, the jurisdiction to fulfill the obligation to do equitable justice to such claimants by furnishing them a complete remedy. * * * * * That litigation as we have seen may properly be carried to a complete settlement of all claims, without regard to whether the prayer for limitation of liability is denied or not."

See also the decisions of the District Court for the Southern District of New York, viz:

The Linseed King — Petition of Spencer Kellogg & Sons Inc., 24 Fed. (2nd) 967.

In Re Atlantic Gulf & West Indies S. S. Lines, 20 Fed. (2nd) 975.

Error No. 5

It is respectfully urged that the Circuit Court of Appeals erred in holding that the complete and full jurisdiction of the Admiralty Court, which is decreed in the above mentioned case of *Hartford Accident & Indemnity Co. vs. Southern Pacific Co., supra*, is dependent upon the consent or election of the respondent.

This ruling of the Circuit Court of Appeals is in direct conflict with the decisions of this Court, in addition of the last mentioned decision, and is in conflict with the decisions of the Circuit Courts of Appeals and the District Courts of the United States in that, first, the jurisdiction of the Federal Admiralty Courts is limited and controlled by law and cannot be conferred by consent, and want of jurisdiction cannot be waived, modified or affected at the discretion or election of any party, viz:

King Iron Bridge Co. vs. Otoe County, 120 U. S. 225; 30 L. Ed. 623; 7 S. Ct. 552;

New England National Bank vs. Calhoun, C. C. A. (N. M.) 9 Fed. (2nd) 272;

Highway Construction Co. vs. McClelland, C. C. A. (Mo.) 14 Fed. (2nd) 406;

Danks vs. Gordon, C. C. A. (N. Y.) 272 Fed. 821;

New York Life Ins. Co. vs. Johnson, C. C. A. (Iowa) 255 Fed. 958;

Perez vs. Canadian Land & Fur Co., D. C. (La.) 14 Fed. (2nd) 181;

McLaughlin vs. Western Union Tel. Co., D. C. (L. A.) 7 Fed. (2nd) 177;

Rosenberg vs. Shuler, D. C. (Okl.) 289 Fed. 820.

and, second, the decision of the Circuit Court of Appeals that the jurisdiction of the Admiralty Court, under a petition for limitation of liability, fails, and that the petitioner's proceedings should be dismissed

for want of jurisdiction at the instance of a seaman, who declares an election to prosecute his claim before a jury in a court of law, is squarely in conflict with the decision of this Court, in the case of

The Edward, In re East River Towing Co., Inc., (N. Y. 1924) 266 U. S. 355; 45 S. Ct. 114; 69 L. Ed. 324, 1925 A. M. C. 33.

Upon the same point the decision of the Circuit Court of Appeals is in direct conflict with two decisions of the Circuit Court of Appeals for the Second Circuit, viz:

In re Petition of Union Sulphur Co. (C. C. A., N. Y. 1924) 5 Fed. (2nd) 1023;

The Clarence P. Howland (C. C. A., N. Y. 1925) 6 Fed. (2nd) 791.

Wherefore, it is respectfully submitted that the petition for writ of certiorari in this case should be granted, and the decree of the Circuit Court of Appeals for the Ninth Circuit reversed, with directions to affirm the decree of the District Court.

Respectfully submitted,

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